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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 358

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEILL AND FRANK CELESTE,
Petitioners,
v.
THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is printed in Mass. Adv. Sh. (1968) 641 (Appendix A, *infra,* p. 21).

Statement of Grounds on which Jurisdiction is Invoked.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

The judgments sought to be reviewed were entered on May 3, 1968.

The facts of this case squarely raise the recurring and important constitutional and statutory issue of whether the

police may, without prior judicial approval, record and introduce into evidence the telephone conversation between a criminal defendant who was unaware that his conversation was being monitored and a person who consented to the installation of the recording device. The relevant facts giving rise to this issue are as follows:

On October 27, 1966, the Suffolk County Grand Jury returned the indictments enumerated below against the defendants, Jack Douglas, Frank Celeste, Alexander Celeste and Arthur J. O'Neill, upon which they were subsequently convicted.[1]

Petitioners filed motions to suppress and exclude from the evidence testimony concerning the contents of a tape-recorded telephone conversation, and petitioners preserved their rights to appeal the denial of their motions by taking timely exceptions to the rulings of the trial Court. Assignments of error Nos. 3, 10, 21, 23, 27 of Frank Celeste (R. 43, 48, 49); Nos. 3, 23, 26, 27 of Douglas (R. 125, 130, 131); Nos. 2, 22, 27 of Alexander Celeste (R. 157, 162, 163); and Nos. 3, 22, 27 of O'Neill (R. 141, 146, 148); No. 6 of O'Neill (R. 142); and No. 7 of Alexander Celeste (R. 158). It is beyond dispute that this constituted an important part of

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[1]

Indictment No.	Defendant	Offense
26323	Douglas	Threats to extort
26324	Douglas	Threats to extort
26326	F. Celeste	Violation of Mass. G.L. c. 140, § 110
26329	A. Celeste	Violation of Mass. G.L. c. 140, § 110
26330	A. Celeste	Accessory before fact to threats to extort
26378	A. Celeste	Accessory before fact to threats to extort
26381	O'Neill	Threats to extort
26382	O'Neill	Threats to extort
26380	Douglas	Conspiracy to extort
26380	F. Celeste	Conspiracy to extort
26380	A. Celeste	Conspiracy to extort
26380	O'Neill	Conspiracy to extort

the Commonwealth's case and that, if it was improperly admitted, petitioners' convictions cannot stand. The petitioners appealed their convictions to the Supreme Judicial Court of the Commonwealth of Massachusetts, arguing, *inter alia,* the exceptions and assignments of error listed above. The convictions were affirmed on May 3, 1968, and judgments were entered on May 3, 1968, on which date the convictions became final under Massachusetts law.[2]

During the course of the hearing on the motions to suppress, it was established that detectives from the office of the Suffolk County District Attorney conferred with one Melvin Sacks concerning the subject matter of the instant cases (Tr. of November 30, 1966, p. 95). Thereafter, on October 11, 1966, and October 12, 1966, Detective McLean of the District Attorney's staff listened to telephone conversations between Sacks and the defendant Douglas, by means of an extension telephone in Sacks's home (Tr. of November 30, 1966, pp. 99, 111). Detective McLean testified that he overheard two telephone calls, using an extension telephone, without making himself known to the party on the other end of the line; that the telephone call of October 11 was placed by Sacks, and that the call of October 12 was an incoming call made to Sacks. Detective McLean also testified that there was no "tap" on Sacks's phone at that time (Tr. of November 30, 1966, p. 114). During the Commonwealth's opening it became apparent that a tape recorder had been connected to Sacks's telephone (Tr. 90).

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[2] The Commonwealth then moved for revocation of the stays of execution of sentence then in force, which motions were granted, over the objections of the petitioners, by the Supreme Judicial Court in the cases of Douglas and Alexander Celeste, and by the Superior Court in the case of Frank Celeste. On May 31, 1968, an application for stay of execution of sentence pending certiorari was denied by Associate Justice Fortas, and all of the petitioners are presently serving their sentences.

There was testimony that the tape recorder had been installed on or about October 11, 1966; that the first machine did not function properly, and that a second machine was installed on or about October 15, 1966 (Tr. 226-227). Sacks testified that on Sunday, October 16, 1966, in the presence of an attorney named Ring, he telephoned the petitioner Douglas (Tr. 222), and that the conversation which took place between them was recorded.

A voir dire was held on the admissibility of the tape-recorded conversation (Tr. 296). During the voir dire Detective McLean testified that he plugged the tape recorder into the telephone lines in Sacks's home (Tr. 226, 240); that no application was made to the Court for permission to overhear or record the conversations (Tr. 242); that the consent of the telephone company was not obtained, and telephone company equipment was not used (Tr. 241). Detective McLean stated that the equipment and tapes used were the property of the County of Suffolk (Tr. 235) and were installed in Sacks's home at the direction of Detective Doyle (Tr. 225).[3]

The trial judge was asked to take judicial notice of the provisions of section 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605, penalizing unauthorized interception of communications (Tr. 806). The Commonwealth conceded that no judicial authorization for a wiretap was sought or granted in accordance with Mass. G.L. c. 272, §§ 99-101, as amended (Tr. 806). The trial judge ruled that the tape-recorded conversation was admissible, and permitted the tape recording to be played to the jury twice during the trial, over the objections and exceptions of counsel, as noted *supra*.

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[3] Detective McLean also testified that the tapes used could be edited or spliced (Tr. 239), and that tapes could be doctored or erased; that words could be added or erased (Tr. 239, 244, 802, 803).

Questions Presented.

I. Do the Fourth and Fourteenth Amendments to the United States Constitution require prior judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone?

II. Do section 605 of the Federal Communications Act and the regulations promulgated thereunder require prior judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone?

Argument.

This case raises—in clear and dramatic form—an important constitutional and statutory issue which has divided this Court over the years. Petitioners' convictions rest on a tape recording obtained by the police, who, without prior judicial approval, attached an electronic recording device to the telephone of one Sacks, and then had him place a call to petitioner Douglas; during the call Douglas made certain statements incriminating to all the petitioners; these statements were recorded and, over the repeated objection of petitioners, the tape was played to the jury. The recording was played not to corroborate live testimony of the conversation already given; on the contrary, the recording itself was the chief evidence of the conversation, and live testimony was introduced merely to corroborate and elaborate it.

a. This case presents the Court with an opportunity to reconsider and overrule the much criticized case of On Lee v. United States.

The violation of these petitioners' rights under the Fourth and Fourteenth Amendments goes well beyond the violations claimed in such cases as *Lopez* v. *United States,* 373 U.S. 427 (1963); *Rathbun* v. *United States,* 355 U.S. 107 (1957); and *Osborn* v. *United States,* 385 U.S. 323 (1966). This conviction can be sustained only if the Court is willing to rest on the crumbling authority of *On Lee* v. *United States,* 343 U.S. 747 (1952).

In *Lopez* the "only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant . . ." 373 U.S. 427, 442 (concurring opinion of the Chief Justice). Here, the purpose was quite clearly to gather evidence of a crime. Moreover, in *Lopez* the defendant was at least aware that he was speaking to a government agent; here, petitioner Douglas thought that he was talking to a long-time associate and co-worker. Thus, in terms of the test announced in *Katz* v. *United States,* 389 U.S. 347 (1967)—whether the defendant is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world" (*id.* at 352)—the petitioners here have a decidedly stronger claim than did *Lopez.* Finally, the *Lopez* case did not involve telephonic communication, and hence did not raise any issue under section 605 of the Federal Communications Act. This case, which did involve interception and divulgence of a telephone conversation, raises considerable question under that Act. *Cf. Lee* v. *Florida,* — U.S. — (1968), 36 L.W. 4652.

In *Rathbun, supra,* the police listened to a conversation on a telephone extension which "had not been installed there just for this purpose but was a regular connection,

previously placed and normally used." 355 U.S. at 108. The Court emphasized the well-known fact that the "telephone extension is a widely used instrument of home and office . . ." *Id.* at 109. Thus—again in terms of the test announced in *Katz* (see *supra*)—the petitioner Douglas was more "justified" in relying on the expectation that the police would not install a special device to record his conversation than was Rathbun in expecting that no one would listen in over a regularly used extension. Indeed, in this case petitioner Douglas knew that Sacks *did not have* an extension (or a party line) on his home telephone. Moreover, *Rathbun* did not involve any secret recording of conversations; nor the playing of a tape to the jury. In that case, at 108, "the police officers testified" as to the contents of the conversation. Thus this case combines some of the evils alleged in *On Lee* v. *United States,* 343 U.S. 747 (1952), with those claimed in *Rathbun.*

In *Osborn, supra,* there was, of course, prior "judicial authorization" for the recording. And the Court relied heavily on this in concluding that—

> "There could hardly be a clearer example of ' "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" ' as *'a precondition of lawful electronic surveillance.'* " (Emphasis added.) 385 U.S. at 330.

In this case, although it is conceded that there was electronic recording, there was no prior judicial authorization of any kind. The Court in *Osborn* explicitly disavowed reliance "upon the broad foundation of the Court's opinion in *Lopez* . . . ," and instead decided the case "within the narrower compass of the *Lopez* concurring and dissenting opinions." *Id.* at 327. This case seems clearly to fall outside that "narrower compass."

The facts of this case force a reconsideration of the crumbling authority of *On Lee* v. *United States,* 343 U.S. 747 (1952). In *On Lee,* like here, the police overheard a conversation between the defendant and an "associate" who, unknown to the defendant, had joined forces with the police. In *On Lee* the conversation was overheard by means of a transmitter hidden on the "associate," while in this case the conversation was monitored by a recording device attached to the "associate's" telephone. Accordingly, in at least one important respect this situation presents an even stronger case for reversal than *On Lee* did. In that case there was no interception of a telephone call, and hence no substantial issue under section 605 of the Federal Communications Act. In this case this issue under that Act is substantial indeed. See *Lee* v. *Florida, supra.* Moreover, in that case there was no recording device used, while here there was. Again—in terms of the test announced in *Katz, supra,* p. 6—a person may place more "justified reliance" on his conversation not being recorded than on its not being overheard.[4] (See note 5, *infra.*)

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[4] There is one respect in which this case may not be as strong for reversal—at least in the view of former Chief Justice Warren—as *On Lee.* In that case the government, at the trial, "put on the narcotics agent who had been at the receiving end of the radio contact" instead of putting on the less reputable informant himself. See concurring opinion of Mr. Chief Justice Warren in *Lopez* v. *United States, supra,* at 441, 443. In this case the government similarly used the tape recording, rather than Mr. Sacks, to present the evidence of the conversation. But here, unlike in *On Lee,* Sacks had been called to the stand by the government for other testimony and to corroborate the tape, and was thus available for cross-examination. This difference does not, however, have any bearing on the issues raised under the Fourth and Fourteenth Amendments; it goes only to the fairness of the conduct of the trial itself. As far as the violation of rights under those amendments is concerned, this case is indistinguishable from *On Lee.*

It would appear that a number of sitting Justices now "agree with Mr. Justice Brennan that *On Lee* was wrongly decided and should not be revitalized . . ." *Lopez* v. *United States, supra,* at 441 (concurring opinion of former Chief Justice Warren) and 446 (dissenting opinion of Mr. Justice Brennan, Mr. Justice Douglas and former Justice Goldberg). Moreover, two present Justices, who were not on the Court when *On Lee* was decided (Mr. Justice Marshall and Chief Justice designate Fortas) have never joined an opinion which "revitalized" that case. Indeed, both of these recently appointed Justices have expressed views which suggest that they might not sustain a conviction in a case like this.[5]

It is not surprising, therefore, that a distinguished scholar on electronic eavesdropping and the Supreme Court has recently concluded that—

> "The Court may thus be moving toward an adoption of Justice Brennan's dissenting views in *Lopez* that all forms of electronic aids to the ear must comply with the Fourth Amendment." Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 Crim. Law Bul. 83, 87 (1968).

This case presents the Court with a unique opportunity to apply its clarifying decision in *Katz* v. *United States,* 389 U.S. 347 (1967), to the age-old and continuing problem of

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[5] See the reported statement of Mr. Justice Marshall at the oral argument in *Lee* v. *Florida,* 3 Crim. L. Rep. 4056: "Mr. Justice Marshall pointed out that while a person with a party line might reasonably expect that someone might listen in to a conversation he would never anticipate that the conversation would be recorded." See also the reported statement of Mr. Justice Fortas in the same argument: "I don't think that the use of a party line telephone releases a man from his right to be constitutionally protected by the Fourth Amendment." *Id.* at 4057. See *Lee* v. *Florida, supra.*

electronic recording of conversations with the consent of one party but without the knowledge of the other.

Previous cases raising this and related issues have all been decided on the now discredited " 'trespass' doctrine," which "can no longer be regarded as controlling."[6] 389 U.S. at 353. Under that "all or nothing" theory, the initial and often dispositive question was whether the overheard conversation occurred in a "constitutionally protected area." 389 U.S. at 370. If it did, then all the safeguards of the Fourth Amendment were thought to apply; if it did not, then none of these safeguards were deemed applicable. *Katz,* on the other hand, seems to recognize a *continuum* of constitutional protections, which begins with conversations that all men would legitimately expect to be completely private and extends to conversations in which there is some reasonable expectation of partial, though not complete, privacy. Indeed, in the *Katz* case itself, the Court suggested that Katz's conversation in a glass phone-booth may not have been protected from "the intruding eye" (*e.g.,* a lipreader), but that it was protected from "the uninvited ear."[7] The important and recurring question raised by this case is whether a person speaking to an "as-

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[6] In *On Lee* the Court, citing *Goldman* v. *United States,* 316 U.S. 129, relied heavily on its conclusion that "no trespass was committed." 343 U.S. at 747. And in *Lopez* the Court emphasized the similar point that the agent "was not guilty of an unlawful invasion of petitioner's office. . . ." 373 U.S. at 438. In *Osborn* the Court did not rely on the trespass theory, but in that case the police had secured prior judicial approval.

[7] As Justice Harlan put it in his concurring opinion: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361. There can be no question in this case that the first—factual—requirement has been met; what petitioners will ask this Court to decide is the important policy issue of whether the second requirement is also fulfilled.

sociate" on his own telephone is justified in relying on the expectation "that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352.

The Massachusetts Supreme Judicial Court decided this case on a theory strikingly similar to that rejected by the United States Supreme Court in *Katz*. It held, in effect, that there was no wiretap at all, because one of the parties to the conversation consented. It concluded, therefore, that the Fourth and Fourteenth Amendments were wholly inapplicable and afforded no protection whatever.[8] This "all or nothing" approach, which omits any consideration of justified reliance on partial privacy, seems inconsistent with the reasoning of this Court in *Katz*. In our brief and arguments we intend to ask this Court to recognize that a person who speaks into a telephone has some justification in expecting that his conversation will not be recorded by the police, even with the consent of the other party.[9] It may well be true that he has somewhat less justified reliance than when the other party has not consented. But this should not be dispositive under the Supreme Court's approach to the Fourth Amendment. Some prior judicial approval should be required whenever the police seek to intrude into and record a conversation that one party reasonably expects will not be "broadcast to the world." Since the invasion of privacy may be somewhat less when one party has consented than where neither party has con-

[8] Furthermore, the Supreme Judicial Court also seemed to accept the theory of the trial Court that the Fourth Amendment does not apply to "a recording of telephone threats, themselves constituting the commission of a crime. . . ." This also seems inconsistent with the approach taken by the United States Supreme Court: the conversations in *Osborn* (and in *Lopez* and *Rathbun* as well) also constituted a crime; yet the Court assumed they were no different from other, merely evidentiary, statements.

[9] See statement of Mr. Justice Marshall cited in note 5, *supra*.

sented, perhaps the requirements for securing prior judicial approval ought to be somewhat less rigorous.[10] But surely some prior judicial approval should be required where, as here, there has been a significant violation of the scope of privacy on which petitioner Douglas "justifiably relied," 389 U.S. at 353; and there are no "legitimate needs of law enforcement [which] . . . demand specific exceptions" to the requirement of prior judicial approval. *Id.* at 362 (concurring opinion of Mr. Justice Harlan).

This Court has strongly suggested such a requirement already in *Osborn* v. *United States,* 385 U.S. 323 (1966). In that case the invasion of petitioner's privacy was no greater than here. Indeed, his reliance was, if anything, less justifiable there than here. In that case, as here, one party to the conversation consented to its being recorded. In that case, but not here, petitioner "knew he was talking to a law enforcement officer . . ." (at 327, footnote 4). Moreover, in that case the conversation was a face to face one, the recording and divulging of which is not regulated by statute; while here petitioner could reasonably place some reliance on section 605 of the Federal Communications Act, which regulates disclosure of intercepted telephone messages. In any event, it certainly cannot be argued that the violation of petitioner Douglas's right of privacy here was less substantial than the violation alleged in the *Osborn* case. Yet in that case the Court rested its decision on the fact that the prosecutor there employed " ' "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" ' as 'a precondition of lawful electronic surveillance' " (385 U.S. at 330), while here it is undisputed that this procedure of "antecedent justifica-

[10] For example, since only one party's rights are being violated, perhaps the requirement of specificity may be relaxed, or the permissible duration of the tap may be expanded. *Cf. Berger* v. *New York,* 388 U.S. 41 (1967).

tion" was not followed, although a state statute made it possible to ask for prior approval and although there were no pressing reasons for failing to do so.[11]

It is unclear whether this Court would have sustained Osborn's conviction if there had been no antecedent justification "which fully met the 'requirement of particularity' which the dissenting opinion in *Lopez* found necessary." 385 U.S. at 329. It seems patently clear that at least some of the Justices who voted to affirm that conviction might have had other views if there had not been such prior approval.

We intend to ask this Court, therefore, to interpret its recent decisions as one distinguished scholar has already suggested:

> "The frequent and approving references to *Osborn* in *Katz* may also imply a Fourth Amendment court-order requirement for the recording of a conversation by one of the parties." Schwartz, "Electronic Eavesdropping—What the Supreme Court Did Not Do," 4 Crim. Law Bul. 83, 87 (1968.)[12]

Another commentator has also noted that "*Osborn* and the *Berger-Katz* gloss on that case may indicate that the Court is moving toward a court order system for participant as well as third party monitoring." Greenawalt, "The Consent Problem in Wiretapping and Eavesdropping: Sur-

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[11] The Supreme Judicial Court construed the statute, Mass. G.L. c. 272, § 99 (as amended by St. 1959, c. 449, § 1), as not requiring Court approval if one of the parties consents. *Commonwealth* v. *Douglas*, Mass. Adv. Sh. (1968) 641, 647-648, Appendix A, *infra*, p. 21. Thus the United States Supreme Court must decide the case as if there were no state statute governing the recording of the telephone conversations in which one party consents.

[12] This Court also cited *Osborn* with approval—indeed relied on it—in *Berger* v. *New York*, 388 U.S. 41, 55-56 (1967).

reptitious Monitoring with the Consent of a Participant in a Conversation," 68 Col. L. Rev. 189 (1968).

The facts and opinion of the Supreme Judicial Court of Massachusetts in this case raise this important issue crisply and appropriately. (See the opinion in Appendix A, *infra*, p. 21.) They provide this Court with a unique opportunity to clarify its decision in *Osborn* and to tell law-enforcement officials and Courts all over the Country whether its approving references to prior judicial authorization in *Osborn* was merely elaborate *dictum* or a requirement of the United States Constitution.

b. There is a direct conflict between the Circuits and between two Circuit Courts and the Massachusetts Supreme Judicial Court.

It should not be surprising, in light of the importance and difficulty of the above-discussed issue, that state and federal courts are confused and divided over whether prior judicial approval is required for electronic monitoring of telephone conversations where one party has consented. Indeed, there is a direct conflict among the Circuits, and between the Supreme Judicial Court of Massachusetts and the Seventh and Tenth Circuits over this important matter of federal constitutional law.

On March 18, 1968, the United States Court of Appeals for the Seventh Circuit decided the case of *United States* v. *White*, 36 U.S. L.W. 2613. (The text of the opinion is attached as Appendix C, *infra*, p. 42.) In that decision the Circuit Court explicitly decided to "apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented." The "situation" there presented involved a conviction which rested in part on the testimony of agents "that they heard defendant make self-incriminating statements, which had been trans-

mitted over the air by an electronic device hidden under the informer's clothes." The government had not "relied on any warrant or court order." The Court reversed the conviction, over a dissent which, like the Supreme Judicial Court in this case, argued that "there was no 'eavesdropping' involved in the instant case [because] one party to the conversation consented to their electronic recording and transmission." That the majority opinion in the *White* case was in direct conflict with their opinion in this case was not disputed by the Massachusetts Supreme Judicial Court. They made no effort to distinguish *White;* instead they described it as "a case which seems inconsistent with the Supreme Court decisions already cited." Mass. Adv. Sh. (1968) 641, 649-650, Appendix A, *infra,* p. 31. And the Massachusetts Supreme Judicial Court is correct; the Seventh Circuit case is "inconsistent" with the Supreme Court's decisions in *On Lee, Rathbun* and *Lopez.* It follows the more recent decisions in *Osborn* and *Katz* and the minority opinions in *Lopez* by requiring prior judicial authorization as a precondition of lawful electronic surveillance, even when one party has consented.

The Tenth Circuit has substantially agreed with the Seventh Circuit in *Doty* v. *United States* (10th Cir., June 4, 1968, Nos. 9031, 9032, 9033, 9035, 9036, 9037, 9038, 9034) (Appendix D, *infra,* p. 51). In *Doty* the Government introduced tape recordings of telephone conversations carried on between one of the defendants and an undercover investigator. The Court said:

> "We think the principles of Katz are applicable here. There is, to be sure, a factual difference between this case and Katz. We are unable to see any distinguishing difference between the placing of the eavesdropping device at one rather than at the other end of the telephone line over which the recorded conversation was

> communicated. The fact that the appellant's recorded conversation was with an undercover agent of the Government does not render it admissible. United States v. White, 7th Cir. 1968, F. 2d , March 18, 1968, Nos. 16021, 16022. But see Dancy v. U. S., 5th Cir. 1968, F. 2d , Feb. 1, 1968, No. 24611. Because no prior approval by judge or magistrate was sought or obtained, the search was unreasonable, and appellant Epps is entitled to a new trial without this evidence being used against her." (Appendix A, *infra*, p. 21.)

The Tenth Circuit thus explicitly followed the holding of the Seventh Circuit in the *White* case and explicitly refused to follow the conflicting decision of the Fifth Circuit in *Dancy*.[13]

There is thus a clear and direct conflict between the Fifth, Seventh and Tenth Circuits, and between the Seventh and Tenth Circuits and the Massachusetts Supreme Judicial Court, with respect to the Fourth and Fourteenth Amendments problem here presented.

The need for authoritative resolution of these conflicts has taken on an increased urgency as a result of this Court's recent ruling in *Lee* v. *Florida*, — U.S. —, 36 L.W. 4652 (June 17, 1968), holding that evidence obtained in violation of section 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605, is inadmissible in a state criminal proceeding.

The opinion of the Court left open the question of what degree of protection should be afforded a defendant where the other party gives "consent" to the police, or where the police listen in on a "regularly used" telephone. 36 L.W.

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[13] The Fifth Circuit has also refused to apply the *Katz* decision to electronic monitoring done with the consent of one party in *Dryden* v. *United States*, 3 Crim. L. Rep. 2028.

at 4653. But the Court did seem to recognize a *continuum* of protection rather than the "all or nothing" rule applied by the Massachusetts Supreme Judicial Court in this case.[14]

Now that this Court has mandated that the exclusionary rule shall apply in cases where section 605 is violated, it becomes even more important to define the scope of section 605's prohibition. Moreover, there have been important legal changes since the Court last spoke on the general issue of one-party consent in the context of section 605. In *Rathbun* the Court emphasized the fact that—

> "the regulations of the Federal Communications Commission which control the recording of telephone conversations presuppose that either party may record a conversation and declare that tariff regulations of telephone companies which bar the use of recording devices are unjust and unreasonable and so in violation of § 201 of the Federal Communications Act [citing *In the Matter of Use of Recording Devices in Connection with Telephone Service,* 11 F. C. C. 1033, 1053]." 355 U.S. at 110, footnote 7.

But the Commission has, since the decesion in *Rathbun,* promulgated a Regulation which now bars the use of eavesdropping or recording devices without the authorization "of all parties engaging in the conversation." 31 Fed. Reg. 3400, § 15.11 (filed March 3, 1966). While paragraph (b) of this Regulation would exempt the "operations of any law enforcement officers conducted under lawful authority," it appears clear that guidance is needed from this Court as to the meaning of the critical phrase "under lawful authority." It is petitioners' view that "lawful authority"

[14] For example, the Court noted that a "party-line user's privacy is obviously vulnerable, but it does not necessarily follow that his telephone conversations are completely unprotected by Section 605." 36 L.W. at 4653, footnote 5.

requires prior judicial approval of the sort obtained in *Osborn* but not obtained here.[15]

Furthermore, several state statutes regulating wiretapping and electronic eavesdropping have been interpreted as precluding consensual or participant monitoring. An Illinois statute prohibits the use of "an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto." Ill. Ann. Stat., c. 38, § 14-2a (Smith-Hurd, 1963). The Supreme Court of Illinois has recently interpreted this statute as rendering inadmissible against a nonconsenting participant recordings made with another participant's consent. *People* v. *Kurth,* 34 Ill. 2d 387, 395 (1966). The Supreme Court of Pennsylvania has made a similar ruling with respect to a Pennsylvania statute which reads: "No person shall intercept a communication by telephone or telegraph without permission of the parties to such communication." *Commonwealth* v. *Murray,* 423 Pa. 37 (1966). There would seem to be a striking similarity between section 605 of the Federal Communications Act and the above-cited Illinois statute, insofar as each appears to refer to the permission of a single party ("the sender" in the federal Act and "any party" in the Illinois Act). Yet the Illinois Supreme Court interpreted the Illinois statute to require consent of both parties, a construction which, if applied to the federal statute, would render inadmissible recordings such as those employed in this case.

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[15] Compare the views expressed by the Commission in the area of radio eavesdropping. In a 1966 ruling the Commission noted that "[d]oubt was expressed as to whether most persons assume, or should assume, the risk that their conversations are being overheard or recorded by the use of such devices. . . . [W]e have decided that the objections to this view are well founded and that we should not sanction the unannounced use of listening or recording devices merely because one party to an otherwise private conversation is aware that the conversation is in fact no longer private." 31 Fed. Reg. 3397, 3398 (1966).

Thus we see a puzzling and disturbing conflict of opinion among Courts, scholars and government agencies with regard to a question of constitutional dimension and of statutory and regulatory interpretation. Nor is this the kind of conflict which will work itself out or that will have only limited effect. Every law-enforcement agency in the Country that uses electronic monitoring—and there are many —wants to know, and is entitled to know, whether prior judicial approval is required where one party consents. So long as this conflict continues unresolved, and so long as it remains unclear whether this Court's language in *Osborn* was merely precatory or was mandatory, law-enforcement agencies will continue to apply differing interpretations, and the fundamental rights of suspected citizens will vary with the fortuity of geography.[16] This case presents this Court with an appropriate occasion to clarify this important area of law enforcement.

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[16] This is the kind of area where any clear rule is better than the present confused situation. The requirement of prior judicial approval (except where pressing reasons make it unduly difficult) is not an onerous one for law-enforcement authorities. It is one that they have been living with for many years in the area of search and seizure. What is onerous, especially because it is so unnecessary, is the uncertainty of not knowing whether such approval will be held to have been required after it is too late to remedy the situation.

This confusion among law-enforcement officers is aptly illustrated by a case decided by the Supreme Judicial Court of Massachusetts just after its decision in this case. In *Commonwealth* v. *Maiani*, Mass. Adv. Sh. (1968) 837 (Appendix B, *infra*, p. 37), the District Attorney's office initiated a consensual telephonic recording, and then the next day sought a Court order to authorize the recording both retroactively and prospectively (indicated by the report of the trial judge when he certified the question to the Supreme Judicial Court). The Commonwealth argued that the police did not need a Court order at all, but an order was sought, albeit late, just as "insurance" (Report, No. 14044). The necessity for such confused and haphazard procedures would be eliminated with a clarification of the questions raised in the instant proceeding.

Conclusion.

For the foregoing reasons, petitioners respectfully request this Honorable Court to grant this petition for a writ of certiorari.

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Appendix A.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JACK DOUGLAS & others.

Suffolk. March 4, 1968.—May 3, 1968.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, KIRK, & SPIEGEL, JJ.

Extortion. Small Loans Statute, Validity. *Constitutional Law,* Due process of law. *Eavesdropping. Evidence,* Relevancy and materiality, Hostile witness, Leading question, Redirect examination, Telephone conversation, Acts and declarations of conspirator. *Practice, Criminal,* Voir dire.

Indictments tried in the Superior Court before *Forte,* J.

CUTTER, J. Douglas, Frank Celeste, Alexander Celeste, and Arthur J. O'Neill were indicted for various offences. Douglas and O'Neill were each charged with threats to extort. Alexander Celeste was charged with being an accessory before the fact to such threats. Frank Celeste and Alexander Celeste were each indicted for violation of G. L. c. 140, § 110, making it a crime for an unlicensed person to conduct a small loan business (see fn. 3). All four defendants were charged with conspiracy to extort. Frank Celeste was found not guilty on the conspiracy indictment, but the other three defendants were found guilty. Each defendant was found guilty of the other offences, listed above, with which he was charged.[1] The cases are before us under G. L. c. 278, §§ 33A–33G, as amended. On somewhat conflicting evidence the facts set out below could have been found. The

[1] The Commonwealth nol prossed certain other indictments tried with these cases. Alexander Celeste was found not guilty on two indictments charging threats to extort, and on an indictment for assault and battery. The transcript states that O'Neill, on the day he was sentenced in these cases, pleaded guilty to certain other indictments on which he also was sentenced. The record does not show these indictments to be related to the present cases.

jury were not required to believe, or to regard as controlling, other evidence, which might tend to reflect adversely on the testimony and the behavior of the Commonwealth's principal witness, Melvin Sacks (as a partner in his insurance firm and as an employee of the Celestes from October, 1965, to August, 1966).

No defendant held a State license to make small loans. See G. L. c. 140, § 96, as amended through St. 1962, c. 795, § 1 (see later amendment by St. 1967, c. 190). In September, 1963, Alexander Celeste lent $500 to Sacks, an insurance broker. Interest was to be at the rate of $25 a week (equivalent to 260% per annum). Payments were to be made to one or the other of the Celestes. Some of about eight payments of $25 were made to Alexander Celeste. The other payments were made to Frank Celeste at Sacks's place of business. The payments were not applied to the principal of the loan. Early in November, 1963, Sacks paid Alexander the $500 principal.

In November, 1964, Alexander Celeste again lent Sacks $500 on the same terms. Frank Celeste appeared about once a week to collect $25, and thirty-nine payments of $25 were made between November, 1964, and August, 1965 (a total of $975). During the period, O'Neill began to accompany Frank Celeste when he made collections. No payments were made directly to Alexander Celeste. Sacks did not deduct on his 1965 Federal income tax return any interest payments on this loan.

After these thirty-nine payments had been made, at a time when four or five $25 payments were due, Frank Celeste told Sacks to credit the amount to Frank's insurance account with the insurance firm in which Sacks was a partner with Malcolm Post. This credit involved about $175 for insurance premiums due. Sacks made no interest payments on the loan thereafter, at least until September, 1966.

Sacks closed or sold his insurance agency and for a time after late August, 1965, was unemployed. In October, 1965 (when Sacks, in accordance with his 1964 arrangement with Alexander Celeste, owed the $500 principal plus four or five interest payments), Sacks was told by Alexander Celeste in Frank Celeste's presence, that he could start working for the Celeste brothers at a used car lot ("New England Auto") in Dorchester. He said that they would "table" the loan, pending a later arrangement for paying it. Sacks worked for eight to ten months for New England Auto, was clerk of the corporation, did bookkeeping for it, and was a stockholder in the concern. Sacks left New England Auto in August, 1966, although he worked to some extent on their books for two months thereafter. There was testimony indicating disputes between the Celestes and Sacks concerning the latter's sales activities.

On August 24, 1966, Douglas reported to Alexander Celeste by telephone in Sacks's presence that there had been a call from the district attorney's office concerning Sacks. Sacks, at Alexander Celeste's house, told Celeste that the call was about money Sacks had borrowed from another lender. Sacks's testimony was that Celeste then hit him in the face, and kicked him in the stomach. See, however, the verdict that Alexander Celeste was not guilty of assault and battery (fn. 1). On this occasion, Alexander told Sacks "it was a cardinal sin to borrow money from another loan shark while owing one." Alexander also told Sacks that if he "knew what was good for . . . [his] wife and kids," he had better not say anything to anyone from the district attorney's office. On an earlier visit Alexander had shown Sacks two sticks of dynamite, and on this occasion said that he would not "think twice about blowing up" Sacks's house. Sacks also testified that he saw various victims "take a beating" in back of the Celestes' garage.

Sacks in fact had borrowed from one Zine and owed money to one Carbone. The latter, when called as a witness in the absence of the jury, claimed his constitutional privilege not to testify.

On August 25 or 26, 1966, Sacks was told by Douglas that he knew Sacks was leaving the employment of New England Auto, that Sacks "still owed some money, and that . . . [he would] have to make arrangements to pay it." Sacks had a similar talk with Frank Celeste and with Alexander Celeste. He also had a telephoned inquiry from Douglas who "asked . . . what . . . [Sacks] was doing about getting some money" and said, "You better have it. . . . [Y]ou should pay it, if you don't want any trouble." On September 1, Douglas called again and demanded money by the next weekend. On September 8, 1966, Sacks spoke by telephone with O'Neill and Douglas. O'Neill said, "If you don't want to get hurt, you'd better get some money . . . real fast." Douglas said, "[Y]ou are almost at the end of the road." On September 14, O'Neill told Sacks, "You'd better have some money or you could be put in the hospital for four or five weeks." That day Sacks gave O'Neill $300.

On September 19, Sacks's father withdrew $1,000 from a savings bank and gave Sacks a check for $1,000. Sacks cashed this and paid the proceeds to Douglas. Douglas reported to Sacks that he paid these proceeds to Alexander Celeste. Two days later Douglas asked for the balance. When Sacks replied that he could not get $1,000 "just like that," Douglas said, "When you feel that cold barrel [of a gun] to your head, you'd be surprised how many ways you can think of of coming up with some money." He added, "[Y]our kid must have a long walk . . . from school, and you wouldn't want anything to happen to her knee caps on the the way home, would you?" From early in September, Sacks received numerous telephone calls from Douglas substantially every day pressing for payment. Some of these

calls were to Sacks's house, but many went to Sacks's new place of employment in Quincy.

In September and early October, Sacks consulted an attorney, Mr. Jordan Ring, a neighbor. Mr. Ring then represented a client who had made an attachment on Sacks's house. Sacks wished to get this attachment removed so that he "could raise the money to pay Al Celeste." It was brought out in part on cross-examination, and expanded in redirect examination, that Sacks told Mr. Ring the story of the threats. He informed Mr. Ring that he had told a detective from the district attorney's office nothing, because he did not "want any harm to come to . . . [his] family and" himself. He informed Mr. Ring that he (Sacks) "would rather pay the money" than go to the district attorney's office in view of the risks. Mr. Ring "insisted that . . . [Sacks] go to the District Attorney's office."

On October 11 or 12, 1966, Douglas went to Sacks's place of employment and renewed his demands. Sacks told Douglas he had no money for him. Douglas replied, "I should bust you right in the face right now, but I am not going to. I'm going to see what I can do for you but you'd better have some money in the next day or so."

Sacks called Mr. Ring. Two detectives from the district attorney's office visited him on October 11, 12, and 15. With Detective McLean listening on an extension telephone, Sacks "called . . . Douglas back," apparently in response to a message left with Mrs. Sacks by Douglas. Douglas said, "I can get you a few more days. . . . I should have busted you this morning. You're a no-good . . . ." He also told Sacks that he had "better come up with the money."[2]

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[2] On October 12, Sacks had a conversation with Douglas about how much he then owed. He quoted Douglas as saying that "he had discussed with Al and Frankie [Celeste] and that they had figured [it] out to be $2,400, but that they would give me a break and

Sacks gave the police permission to install a tape recorder on his telephone line. On October 17, there was recorded one of many telephone conversations between Sacks and Douglas during this period. In this conversation Douglas made demands for payment. Mr. Ring, Sacks's attorney, heard the conversation, which originated with a call by Sacks, with the aid of a speaker attached to the recorder on which one "can hear what is being taped." He verified the accuracy of the tape, which was received in evidence, after an extended voir dire. Douglas admitted that the recorded voice was his. The machine "was not telephone equipment." It was installed without the participation or consent of the telephone company, without any judicial authorization, and without Douglas's knowledge. The tape recorder gave off no "beeps" which would inform a person on the line that it was operating. The first machine did not work and it was replaced prior to October 17. This, so the detective who installed it testified, was not a "wire tap," because the machine was installed with the permission of Sacks, the telephone subscriber.

On October 17, Sacks paid to Douglas five $10 marked bills. Sacks was then wearing an electronic device. No tape was procured, however, because the device did not function. On that day the Celeste brothers, O'Neill, and Douglas were arrested.

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make it $2,000." At least the amount of the payments in excess of the $500 originally borrowed by Sacks from Alexander Celeste appears to have been interest, referred to by various witnesses as "vig" or "juice." In the recorded telephone talk of October 17 mentioned in the text, Douglas demanded that Sacks "come up with the vig" and that he "start paying juice." Explanation by Sacks and others of the meaning of these slang expressions was admissible, if judicial notice could not be taken of the meaning. See *Crafts* v. *McCobb*, 303 Mass. 172, 175; *United States* v. *Prochaska*, 222 F. 2d 1, 2–3 (7th Cir.) cert. den. 350 U. S. 836; *People* v. *Knott*, 52 Cal. App. 2d 439, 441–442; Wigmore, Evidence (3d ed.) § 2582.

1. The Celeste brothers contend that G. L. c. 140, § 110, as amended through St. 1962, c. 795, § 2[3] (see later amendment, St. 1967, c. 196, increasing the penalties), is void for vagueness and that the two indictments, charging them with violations of § 110, should have been dismissed because they failed to inform them with sufficient clarity of the offence charged. We perceive no such infirmity in the section or in the indictments.

The Legislature may prohibit and make criminal the unlicensed granting of small loans. It may recognize "the danger that such a business . . . [may] be conducted oppressively" and the desirability of furnishing a "degree of protection to [small] borrowers." *Dewey* v. *Richardson,* 206 Mass. 430, 432. *Goodowsky* v. *Rubenstein,* 225 Mass. 448, 450–451 ("The statute [as it stood prior to St. 1913, c. 347, § 2] does not prohibit all such loans except by licensed persons," but "forbids the making of such loans as a business unless one is licensed. The making of a single loan might be sufficient . . . [in] appropriate circumstances

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[3] Section 110 as in force in 1963 and 1964, reads: "Whoever, not being duly licensed as provided in . . . [§ 96] on his own account or on account of any other person not so licensed, engages in or carries on, directly or indirectly . . . the business of making loans . . . to which . . . [§§ 96–111] inclusive, apply, shall be punishable by a fine of not more than . . . [$5,000] or by imprisonment for not more than two years, or both. Any loan made . . . by an unlicensed person in violation of said sections shall be void. [A] In any judicial proceedings under said sections the fact that the defendant has made or assisted in the making of two or more loans of three thousand dollars or less, upon which there has directly or indirectly been paid or charged, for interest . . . or other expenses, a sum which exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the amount actually received by the borrower, whether such sum has been paid to or charged by the defendant or . . . any other person, shall be prima facie evidence that the defendant has engaged in and carried on the business of making loans to which" §§ 96–112 apply. The letter in brackets has been inserted for convenient reference to the sentence following it.

to warrant a finding that the one making the loan was carrying on the business. But it does not require such a finding"). See *Commonwealth* v. *Silverman,* 220 Mass. 552, 554–555. The section, taken with other sections to which it refers, is adequate "to convey to a person of ordinary understanding . . . [a] description of the prohibited act." See *Jaquith* v. *Commonwealth,* 331 Mass. 439, 442. All rational presumptions are to be made in favor of its validity. See *Commonwealth* v. *Finnigan,* 326 Mass. 378, 379. There is in § 110 no such vagueness as was considered in *Alegata* v. *Commonwealth,* 353 Mass. , – , – , but see pp. – .* The final sentence of § 110 (see fn. 3, at point [A]) in specific terms defines what is sufficient to create a prima facie case of violation by apt reference to at least one set of facts having a rational tendency to show the conduct of a business. Provisions of this type are valid. See *Meunier's Case,* 319 Mass. 421, 425–426. See also *Commonwealth* v. *Williams,* 6 Gray 1, 4–8; *Commonwealth* v. *Spindel,* 351 Mass. 673, 676–678. Proof of two small loans within a reasonable period of time, at a rate of more than twelve per cent per annum, supports the conclusion that the lender was in the business of making such loans. Loans made to friends, or as a matter of charity, are not often effected upon such terms or in such circumstances.

2. The defendants argue various exceptions concerning the evidence received of telephone conversations between Sacks and Douglas. Detective McLean, on an extension line in Sacks's house, listened to one or more such conversations. Mr. Ring (with the aid of a speaker attached to a tape recorder) listened to another. This latter talk, with Sacks's permission, was recorded on a tape. There was no violation of G. L. c. 272, § 99 (as amended by St. 1959,

* Mass. Adv. Sh. (1967) 1457, 1464–1466, 1468–1470, but see pp. 1471–1473.

c. 449, § 1),[4] which creates the crime of eavesdropping. Section 99 is supplemented by § 101. Each conversation was overheard with the consent of Sacks, "a sender or receiver" within § 99 (fn. 4). Section 101 (as amended by St. 1956, c. 48, § 4),[5] merely makes certain conduct prima facie evidence of violation of § 99, but there is no violation where a sender or receiver has given consent to that conduct. The case thus is unlike *Commonwealth* v. *Spindel,* 351 Mass. 673, 675, where "[t]here was no evidence that . . . [any person participating in the conversation] consented to . . . monitoring." We need not consider whether the tape recorder was a "device" which Sacks, as owner of his house and "on premises under his exclusive control" (see § 101,

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[4] Section 99 reads, in part: "Whoever, except in accordance with an order issued as provided herein, secretly *or without the consent of either a sender or receiver,* overhears or attempts secretly, or without the consent of either a sender or receiver, to overhear . . . or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment . . . or by a fine . . . or both" (emphasis supplied). The remaining provisions of § 99, dealing with the issuing of judicial orders for use of various devices, need not now be considered. No such order was issued.

[5] Secton 101 reads, in part: "Proof of the installation in any building of any device or arrangement which may be used for the purpose of violating the provisions of . . . [§ 99] by listening to any spoken words or proof of the tapping of any wire, *unless duly authorized* and *unless done with the consent of the owner or person in control of the building,* shall be prima facie evidence of the commission of the crime of eavesdropping; but nothing contained in this section or . . . [§§ 99 and 100] shall render it unlawful for any person to install and use such a device on premises *under his exclusive control*" (emphasis supplied).

fn. 5), could install and use in any event. See the *Spindel* case, 351 Mass. 673, 677.

In *Rathbun* v. *United States,* 355 U. S. 107, 109–111, there was found no interception of the type then and now forbidden by 47 U. S. C. § 605 (1964). The court approved the admission in evidence of conversations overheard by police on a regularly used extension telephone with the consent of the telephone subscriber, a party to the conversation. A defendant who speaks incriminating words over the telephone runs the risk that the person with whom he talks may be an informer (see *Hoffa* v. *United States,* 385 U. S. 293, 302–303) or that the conversation (as in the *Rathbun* case) may be overheard on an extension telephone. In the interests of sound law enforcement, in these days when telephone talks often supplant face to face encounters, he also should be held to take the risk that his words may be recorded by his listener. See *Lopez* v. *United States,* 373 U. S. 427, 437–440 (tape admissible of a personal interview during which a bribe was attempted). In the present case there was, of course, no such prior judicial authorization of the use of a recording device as in fact took place in *Osborn* v. *United States,* 385 U. S. 323, 327–331. There was no occasion in the *Osborn* case for the Supreme Court of the United States to consider again the broad issue presented and decided in favor of admissibility in the *Lopez* decision, 373 U. S. 427, 437–440. There was no reason for such prior approval. The present case was not one of surreptitious placing of a recording device in another's office (see *Berger* v. *New York,* 388 U. S. 41, 44–45), or in a position enabling third persons to overhear, without the consent of any party to the telephone conversation, a private call made from a public telephone booth. See *Katz* v. *United States,* 389 U. S. 347, 354–359.

In the case at bar, there was at most a recording of telephoned threats, themselves constituting the commission of a

crime, made to the victim of the crime and of continued unlawful harassment. The victim, himself a participant in the conversation, consented to the recording. He was sitting in his own house, at his own telephone, with his own attorney listening to the conversation. If it be relevant (see *Lewis* v. *United States,* 385 U. S. 206, 210–212), Sacks was not an informer committing a breach of confidence, and could be found to have been a victim of extortion. See *Dryden* v. *United States,* F. 2d (5th Cir.—recorder on extension telephone).[ab] Cf. *United States* v. *White,* F. 2d , [b] (7th Cir.—electronic device on informer), a case which seems inconsistent with the Supreme Court decisions already cited.

No illegal search or other violation of any constitutional or statutory provision made the recording inadmissible. See *Glacy* v. *United States,* 361 F. 2d 31, 35–36 (1st Cir.), cert. den. 385 U. S. 831; *Harris* v. *United States,* 367 F. 2d 633, 635 (1st. Cir.), cert. den. 386 U. S. 915. Any other conclusion, we think, would give members of the underworld carte blanche to intimidate (or otherwise to engage in criminal conduct injurious to) innocent members of the public over the telephone, without risk that their words could be overheard or recorded (even with the consent of the victims) in a manner which would be used against the offenders in a court. See *Schwartz* v. *Texas,* 344 U. S. 199, 203; *Pugach* v. *Dollinger,* 277 F. 2d 739 (2d Cir.) affd. 365 U. S. 458; *United States ex rel Griffin* v. *Hendrick,* 360 F. 2d 614 (3d Cir.). Cf. *Nardone* v. *United States,* 302 U. S. 379, 382–385; 308 U. S. 338, 340–341; *United States* v. *Dote,* 371 F. 2d 176, 180–181 (7th Cir.).

3. There is no merit in the defendants' contention that the judge improperly received evidence of (a) a September,

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[ab] 3 Cr. L. Rep. 2028.

[b] 36 U. S. L. Week 2613.

1963, conversation[6] between Sacks and Alexander Celeste occurring prior to the period (October 15, 1963 to October 18, 1965) mentioned in the indictment as explained by particulars, and (b) a loan transaction which took place in part before that period.

As to Alexander Celeste, the conversation in September, 1963, related to a loan transaction the execution of which, by the collection and payments of interest and principal, continued well into the period covered by the indictment, and shed light on Celeste's activities during the period, including payments on the 1963 loan and the making and collection of the later loan. The evidence was relevant. See *Commonwealth* v. *Stasiun,* 349 Mass. 38, 46–47. Cf. *Commonwealth* v. *Runge,* 231 Mass. 598, 600.

The somewhat ambiguous evidence of Edwin Small concerning a 1966 loan to him by Alexander Celeste, at most tended to explain other activities of Alexander Celeste within the indictment period, if, indeed, the evidence was sufficiently definite or comprehensible to have any probative effect whatsoever. There was ample indication that Small was a hostile witness. It was not error to permit the prosecution (which had called him) to ask him leading questions. *Commonwealth* v. *Monahan,* 349 Mass. 139, 162–163. *Commonwealth* v. *Soroko,* 353 Mass. , .[c]

4. Similarly without merit is the contention that Sacks was not competent to testify concerning what was done (in

[6] The jury were told that the conversation was admitted only against Alexander Celeste. In any event, verdicts of not guilty were directed on indictments charging O'Neill and Douglas with violations of G. L. c. 140, § 110. The Commonwealth nol prossed indictments charging them with conspiracy to violate § 110. Even if we were to assume that they have standing to argue the admissibility of this evidence, they were not harmed by it, for the evidence as to them would have been relevant substantially only with respect to those indictments.

[c] Mass. Adv. Sh. (1967) 1417, 1421.

crediting payments to principal or interest) with the payments made on the 1963 loan. Sacks, as the debtor under that arrangement, could reasonably conclude (where weekly payments remained constant at $25 a week, and were followed by a single payment of the $500 amount of the original loan) that the earlier payments had been applied as interest. Sacks's conclusions were consistent with the terms of the agreement imposed on him by Alexander Celeste.

5. The judge did not abuse his discretion when he refused to permit Sacks to be cross-examined concerning a conversation with Orlando J. Carbone, a witness later called by Douglas. The conversation had taken place in January, 1967, during the trial of these cases. The judge, as the evidence then stood, reasonably regarded this inquiry as irrelevant to the issues raised in the indictments. At a bench conference, the judge excluded the line of questions until such time as some other evidence showed the inquiry to be relevant.[7] The assistant district attorney stated that he would produce Sacks for further cross-examination on a day's notice, if evidence later showed the inquiry to be relevant, and not merely to relate to a collateral matter.

When Carbone later took the stand, it was represented to the judge that the witness would claim his privilege not to testify because of the possibliity of self-incrimination. The judge conducted a voir dire, in the absence of the jury, and, except in answering questions concerning his name, address, and employment, Carbone claimed his privilege. Douglas's counsel then said, "I submit that there would be no further purpose in inquiring of the witness." An exception claimed prior to the voir dire (to the judge's state-

[7] Douglas, the only defendant to take the stand, later testified in effect that he had interceded with Carbone in behalf of Sacks in order to persuade him not to press Sacks for payment of a loan made by Carbone and that he had only pressed Sacks to pay Alexander Celeste $200 owed by Sacks. The jury, of course, was not required to believe this testimony.

ment that he would not let the witness identify himself and claim his privilege in the presence of the jury until he heard the voir dire) was not renewed by the defendants after the voir dire. It was within the judge's discretion to hold a voir dire to ascertain whether inquiry in the presence of the jury would be prejudicial to the defendants or productive of relevant testimony. No objection or exception to what the judge did intelligibly raised the issue (see *Commonwealth* v. *Baker,* 348 Mass. 60, 63; cf. *Murphy* v. *Commonwealth,* 353 Mass. , ,[d] whether the witness was being afforded too broad a protection based upon his privilege.

6. Sacks's testimony on redirect examination about what he told his attorney, Mr. Ring, was with respect to a matter opened up on cross-examination by inquiry about (a) what Sacks had told the attorney, and (b) what he had or had not told to the district attorney and to certain police officers when he had opportunity to talk to them. There may have been some indication that the defendants were claiming Sacks's story to be recently contrived. See *Commonwealth* v. *Heffernan,* 350 Mass. 48, 51–52. In any event, this testimony on redirect examination was reasonably permitted by the trial judge, as matter of discretion, in explanation of Sacks's testimony on cross-examination about (a) his failure to make more prompt reports concerning the threats to the district attorney and to the police, and (b) his conversation with Mr. Ring. See *Commonwealth* v. *Galvin,* 310 Mass. 733, 747. See also *Commonwealth* v. *Binkiewicz,* 342 Mass. 740, 758; *Commonwealth* v. *Gardner,* 350 Mass. 664, 668–669.

It is irrelevant that this testimony incidentally tended to show that the defendants may have committed other offences, e.g. by intimidating other persons. The testimony was pertinent in that it tended to explain fears which led to Sacks's failure to report to the authorities the threats

[d] Mass. Adv. Sh. (1968) 485, 486–488.

made to him and his delay in letting Mr. Ring do so. All this became of significance because of matters brought out on cross-examination. See *Commonwealth* v. *Feci,* 235 Mass. 562, 567; *Commonwealth* v. *Gettigan,* 252 Mass. 450, 459–460. Similar principles apply to cross-examination (permitted within the judge's discretion) of a witness (Post) concerning an assault upon him by O'Neill, in an effort to test Post's credibility by showing that he feared O'Neill. This was not a case where the prosecution sought to introduce, through a witness called by it, evidence of other crimes to prove commission of the particular crimes charged. Cf. *Commonwealth* v. *Stone,* 321 Mass. 471, 473; *Commonwealth* v. *Welcome,* 348 Mass. 68, 70–71.

7. The defendants contend that testimony by Sacks concerning certain telephone conversations was admitted without prior proof that Sacks was able to identify the voice of the speaker. Objections were made and exceptions saved but without pointing out to the trial judge that the identification of the voice was the ground of any excepiton. There was no specific objection (see *Irving* v. *Goodimate Co.* 320 Mass. 454, 460) based on the issues discussed in *Bond Pharmacy, Inc.* v. *Cambridge,* 338 Mass. 488, 490–491, and *Chartrand* v. *Registrar of Motor Vehicles,* 345 Mass. 321, 325. Sacks testified that he had received a call from Douglas. This reasonably implied that he recognized the latter's voice.

The conversations were relevant. There was also sufficient proof of coöperation by all the defendants in pressure on Sacks concerning the collection of the loans to him to warrant the judge's preliminary conclusion that there was a prima facie case of conspiracy permitting evidence of the acts and declarations of one conspirator in pursuance of the common object to be admitted against the others. See *Commonwealth* v. *Stasiun,* 349 Mass. 38, 50–51, and the cases there reviewed.

8. There was ample evidence from which it could be found that the Celestes made, or acted with respect to, two loans in violation of G. L. c. 140, § 110, which were either made or paid within the period mentioned in the indictments and particulars. The evidence, as a whole, showed that the second loan to Sacks in November, 1964, was not a friendly or charitable act, but entered into for profit. Taken with the earlier loan, on the same terms, which was not paid until November, 1963, and with the testimony of widespread harassment and coercion to effect collection of the second loan, the evidence warranted the jury in concluding that (as to Sacks, at least) the Celestes were in the business of making such loans.

There was direct evidence of Douglas's and O'Neill's threats made to Sacks to enforce payment of the unconscionable and illegal 1964 loan. It could be reasonably inferred that the threats were made at the behest of Alexander Celeste, by his employees and in his interest. The evidence already summarized permitted the jury to conclude that, in exerting the pressures upon Sacks, all the defendants were acting in concert as conspirators to extort.

There was no error in refusing to direct verdicts for the defendants.

9. Other assignments of error already have been covered adequately or do not merit discussion.

Judgements affirmed.

John P. White, Jr., for the defendant O'Neill.

David S. Nelson for the defendant Douglas, *Joseph S. Oteri* for the defendant Alexander Celeste, *& Monroe L. Inker* for the defendant Frank Celeste, joined in a brief.

Murray P. Reiser, Assistant District Attorney (*Roger Michael Carey,* Legal Assistant to the District Attorney, with him), for the Commonwealth.

Appendix B.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* EDWARD MAIANI & others[1]

(and eight companion cases).

Suffolk. May 6, 1968.—May 31, 1968.

Present: WILKINS, C.J., SPALDING, CUTTER, SPIEGEL, & REARDON, JJ.

Eavesdropping. Evidence, Telephone conversation.

Report by *Moynihan,* J., in cases in the Superior Court.

CUTTER, J. The defendants were each indicted for (a) conspiracy to conduct a small loans business without a license in violation of G. L. c. 140, § 110 (as amended through St. 1962, c. 795, § 2; see later amendment by St. 1967, c. 196), and (b) violation of § 110. Maiani is also charged with extortion and he, Nazzaro, and Castucci are charged with conspiracy to extort. Each defendant filed a "pre-trial motion to suppress the use in evidence of certain telephone conversations, recordings" of such conversations, and other evidence "obtained by or as the result of a wire-tap or by means of an electronic or other . . . recording device." The trial judge, without decision, on December 11, 1967, reported the motions (G. L. c. 278, § 30A) upon findings which adequately present the question of law whether he should allow the motions to suppress the evidence of the recorded telephone conversations between the defendants and Austin Mortensen.[2] This resport was made before our recent de-

[1] Other defendants are Richard Castucci, William Cafasso, Michael Nazzaro, and Guy Lauria. There were nine separate indictments.

[2] He first reported two other questions: (a) whether G. L. c. 272, § 99, is void on its face as in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, and the Constitution of the Commonwealth; and (b) whether an order of March 2, 1967, referred to in the text of the opinion was valid.

cision in *Commonwealth* v. *Douglas, ante,* .[2]

Upon evidence presented at the pre-trial hearing on the motions to suppress, the trial judge found the following facts: Mortensen resided in Somerville with his wife and children. During the latter part of February, 1967, and on March 1, 1967, Mortensen complained to police officers of telephone calls to his house in Somerville threatening him with bodily harm. He stated that he had received numerous calls from Maiani, Nazzaro, and Lauria demanding the repayment of illegal loans made to him. Mrs. Mortensen stated that she had received telephone calls from unknown persons ordering her to tell her husband to pay the money owed by him on loans. Mortensen requested the police to attach a device to record conversations on his house telephone.

On March 1, 1967, two Boston police detectives, Paul R. McLean and John Doyle, attached to the staff of the district attorney for Suffolk County, went to Mortensen's house and connected a recording device to his telephone.[3] "The entire mechanism . . . [was] installed . . . with . . . [Mortensen's] consent . . . and . . . [he] authorized the police to listen to all conversations that were transmitted through his telephone during the time the conversations were being . . . recorded." After the device was installed, Mortensen called Maiani and had a conversation with him.

The recording device remained attached to the Mortensen telephone for eight or nine consecutive days and during that period all incoming or outgoing calls were recorded, includ-

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[2] Mass. Adv. Sh. (1968) 641.

[3] At first the device consisted of a suction cup induction coil attached to the receiving end of the telephone hand set and connected to a tape recorder. At some later time Detective McLean removed the suction cup from the hand set and replaced it with two clips attached to the telephone wire.

ing conversations with Maiani and Nazzaro. The tapes on which these conversations were recorded were subsequently transcribed by the police.

On March 2, 1967, an assistant district attorney made application to a judge of the Superior Court for an order under G. L. c. 272, § 99, as amended by St. 1959, c. 449, § 1,[4] authorizing the district attorney, and any of his assistants, police officers, or other persons acting under his direction, to intercept communications on the Mortensen telephone, "beginning March 1, 1967, and for three months thereafter." The requested order was issued on March 2, 1967.

1. Our decision in the *Douglas* case, *ante,* ,[b] controls the present cases. The defendants make no contention that the Commonwealth proposes to introduce evidence of any telephone conversations to which Mortensen was not a party or which he did not consent to have intercepted and recorded. Thus the facts appear to be very closely like those in the *Douglas* case, which also involved both loans made in violation of G. L. c. 140, § 110, and threats to extort.

The principal difference between these cases and the *Douglas* case is that in the present cases a court order under § 99 in fact was obtained, whereas in the *Douglas* case no such order was sought or issued. That difference is immaterial.

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[4] The first part of § 99 is quoted in the *Douglas* case, *ante,* , , fn. 4 (Mass. Adv. Sh. [1968] 641, 648). It is provided in the later portions of the section that an order authorizing listening of a type otherwise prohibited by the section "may be issued . . . by any justice of the . . . superior court upon application of . . . a district attorney for the district verified by his oath . . . that there are reasonable grounds to believe that evidence of crime may thus be obtained." The section provides in some detail the procedure to be followed in connection with such an application and order.

[b] Mass. Adv. Sh. (1968) 641.

2. For reasons fully stated in the *Douglas* case, *ante*, , – ,[c] no order was necessary under § 99, which has no application to listening or recording with "the consent of either a sender or receiver" of the conversation. Mortensen, obviously acting for his own protection from threats and attempted coercion, consented to the recording of his conversations and the attachment of the device to his telephone. It is fairly to be implied from the subsidiary facts stated that Mrs. Mortensen also consented. It is not shown that any conversations over Mortensen's telephone with any persons other than Mortensen or his wife were to be offered in evidence. If other persons used the telephone, we think that would not affect the consent to the recording of conversations with any of those persons who gave consent, or the use in evidence of conversations in which they participated.[5] Because § 99 was not violated, we have no occasion to consider now whether the procedure for issuing orders contained in c. 272, § 99 (see also the related provisions of §§ 100–101 as amended), is valid.

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[c] Mass. Adv. Sh. (1968) 641, 647–648.

[5] As stated in the *Douglas* case, *ante* (Mass. Adv. Sh. [1968] 641, 648–650), we do not regard recent decisions of the Supreme Court of the United States as precluding introduction in evidence of a recording of a telephone conversation, made with the consent of one participant to protect him from telephoned criminal threats and attempted extortion. See e.g. *Rathbun* v. *United States*, 355 U. S. 107, 109–111; *Lopez* v. *United States*, 373 U. S. 427, 437–440; *Osborn* v. *United States*, 385 U. S. 323, 327–331; *Berger* v. *New York*, 388 U. S. 41, 44–45; *Katz* v. *United States*, 389 U. S. 347, 354–359. Cf. Greenawalt, The Consent Problem in Wiretapping: Surreptitious Monitoring with the Consent of a Participant in a Conversation, 68 Col. L. Rev. 189, which seriously underestimates the public interest and the interest of a victim of telephoned threats and extortion in recordings as a method of preventing such criminal action. One who invades the privacy of another by telephoned threats cannot be heard to complain that his own privacy has been invaded by recording his threats as a protective measure.

3. For the reasons stated in the *Douglas* case, *ante*, , – ,[d] we think that there was no violation of 47 U. S. C. § 605 (1964). On this question the cases appear to be governed by *Rathbun* v. *United States*, 355 U. S. 107, 109–111, and *Dryden* v. *United States*, F. 2d (5th Cir.).[e] Cf. *United States* v. *White*, F. 2d (7th Cir.).[f]

4. Two questions (see fn. 2) need not be answered. The third and principal question (discussed at length above) is to be answered that there is no occasion to allow the defendants' motions to suppress.

So ordered.

Harvey A. Silverglate for the defendant Castucci.

Jack I. Zalkind, Assistant District Attorney (*Roger M. Carey*, Legal Assistant to the District Attorney, with him), for the Commonwealth.

Joseph S. Oteri for the defendant Maiani & *John P. White, Jr.*, for the defendant Cafasso, joined in a brief.

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[d] Mass. Adv. Sh. (1968) 641, 648–650.

[e] 3 Cr. L. Rep. 2028.

[f] 36 U. S. L. Week 2613.

Appendix C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

Nos. 16021-16022

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES A. WHITE,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

March 18, 1968

Before *Senior Circuit Judge* MAJOR, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* James A. White, defendant, appeals from a judgment following trial by jury, adjudging him guilty of violating 26 U.S.C. § 4705 (a) and 21 U.S.C. § 174. According to his counsel's brief, defendant was sentenced to a total imprisonment of 25 years and to pay a total of $35,000 in fines.

Foremost among errors relied upon are those said to arise out of interceptions of telephone and radio transmissions and the surreptitious placing of a radio transmitter on the person of a government informer during the time that he was conversing with defendant in various locations.

The government's evidence tended to prove the following events which are typical of other episodes not set forth herein.

On December 9, 1965, Harvey Jackson, a government informer, met defendant in the kitchen of the informer's home. He had concealed on his person a Kel radio transmitter. While narcotics agent Carl Jackson was concealed in a kitchen closet, he overheard a conversation between Harvey Jackson and defendant, and observed defendant give a package to Harvey. The package contained heroin. The closet had two doors which the agent left ajar so that he could see defendant and the informer, who asked the number of ounces in the package, and defendant said "one good ounce". Defendant added that he would come the next day for the money. Narcotics agent DeFauw overheard this conversation through a receiver.

The next day agent Jackson was again in the closet, from which he observed Harvey and defendant count $1,000, in official funds previously given Harvey by agent DeFauw, which defendant put in his pocket. Agent Jackson also heard defendant tell the informer he would get more "stuff" on December 14 and arrange to meet the informer at 6 p.m. the next day at Lake and Wells streets for further payment. DeFauw overheard that conversation by receiving radio transmissions from a Kel transmitter previously concealed on the informer's person.

On December 14, 1965, DeFauw placed the Kel set on the informer's person, furnished him with $360 and followed him to the residence of defendant. DeFauw overheard by radio receiver a conversation between defendant and the informer, in defendant's house, in which the money was counted and arrangements made for defendant to sell the informer another two ounces of "stuff" on December 16, for $1250, with payment due within a week and a half after delivery. Defendant said he wanted the money faster, as the "Dagoes" wanted their money sooner. Arrangements were made to meet a 6 o'clock on December 16.

On December 16, 1965, DeFauw placed the Kel set under the informer's clothing and followed him to Clark and Wacker streets, where the informer Jackson met defendant, who entered informer's car. Agent DeFauw, following them in his car, overheard their conversation about the price and quality of heroin by radio receiver. Thereafter the informer left the car, as defendant said he had to meet "this man". Defendant drove the car to State and Randolph streets, where he picked up Sam Minerva, who rode for one-half block. From State and Randolph streets, agent Kerstann followed defendant to Lake and Wells streets, where the informer re-entered his own car. Kerstann by radio receiver overheard defendant say he had met "this man" and would leave the package on the seat. Defendant left the car. Kerstann entered the informer's car and the informer pointed to a package which contained heroin.

On December 28, 1965, DeFauw again placed the Kel set under the informer's clothes and gave him $1250. DeFauw followed agent Jackson and the informer to the latter's residence where *agent Jackson concealed himself in the closet. Defendant later arrived and asked if the informer had the money and they counted out $1250. The informer asked for more "stuff" and defendant said he could get some the next day, but he had to have the money faster as the Dago wanted fast delivery of money.*

From the closet agent Jackson overheard this conversation and observed the transfer of money. Agent DeFauw listened by radio receiver.[1]

On December 29, 1965, agents Connolly and Lewis followed defendant from his residence and into a tavern at 225 North Clark Street, where defendant talked briefly to

[1] The foregoing italicized language is taken from the statement of facts, which the evidence tended to prove, included in the brief filed by appellant.

Harry B. Williams. Connolly saw him go to a nearby Hyman's Clothing Store. Williams then left. Defendant, observed by agents, left Hyman's and drove to State and Randolph Streets where he picked up Minerva who rode for one-half block. Minerva was carrying a white shoe box. When he left the car he was carrying a black brief case. One block later defendant picked up Williams. Meanwhile the informer, equipped with a Kel transmitter, had entered said tavern. Defendant and Williams returned to the tavern. Defendant entered, Williams remaining in the car. Defendant talked to the informer and drove to Lake and Wells Streets. The informer followed. Defendant walked to the informer's car and handed him a sack. Over the radio, Meyer heard defendant ask the informer to take Williams south to Kimbark Avenue and Midway Plaisance. The informer did so. Williams was also carrying a brown paper bag. At 62nd Street and Drexel Avenue the informer gave agent DeFauw a brown paper sack. It contained heroin.

On January 5, 1966, DeFauw placed the Kel set on the informer and gave him $1300. Agent Jackson concealed himself in the kitchen closet of the informer's home. He observed defendant and informer count the money. Defendant told the informer to bring the "remaining $950" to his restaurant, the Dining Room Aluminer. DeFauw heard the conversation by Kel receiver. Defendant wanted the informer to purchase large sums of heroin and to pay in advance.

On January 7, 1966, the informer was in company with agents DeFauw and Kerstann at 59th Street and Stony Island Avenue. DeFauw placed the Kel set on the informer, gave him $950 and followed him to defendant's restaurant which the informer entered. DeFauw heard over his receiver defendant tell the informer that the price of heroin

was going up, and to meet him at Lake and Wells and defendant would get three "things" for $2500.[2]

On January 8, 1966, at 6 p.m. DeFauw saw Minerva standing at State and Randolph Streets. Defendant drove up, stopped, opened the door, and Minerva approached the car. Defendant said "come on, man, give me the package, I've got to get out of here." Minerva handed a brown leather briefcase into the car and said he would pick up the money later. DeFauw placed defendant under arrest and seized the briefcase. It contained heroin.

Early in the trial, when agent Jackson testified that he listened in on a telephone conversation between the informer and defendant, objection by the defense was made on the ground that such interception was a violation of the law of Illinois, as well as the federal constitution and law, but the objection was overruled.

Also the defense objected when DeFauw testified about receiving radio transmissions from the transmitter concealed on the person of the informer. The objection was overruled. At the conclusion of the government's case, a motion by the defense to strike various radio conversations and transmissions to which the various agents testified, on the ground that they were in violation of the Illinois Eavesdropping Statute, and the state's public policy, as well as the fourth and fifth amendments to the federal constitution, was denied by the court.

1. Defendant was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's

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[2] Witness DeFauw was given his report to refresh his recollection. The record shows that this report was given to defense counsel when he started a cross-examination of DeFauw.

clothes. Thereby the agents heard conversations taking place in defendant's home, his car, his place of business, as well as in the informant's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. Informer Jackson did not testify at the trial. There is no contention that the government relied on any warrant or court order.

In *Katz* v. *United States,* 389 U.S. 347 (1967), the Supreme Court reversed a conviction obtained after a trial during which the government had introduced defendant's telephone conversation overheard by federal agents through a device they had attached to the outside of a public telephone booth. In the absence of a proper warrant or judicial order, surveillance was held to be "per se unreasonable under the fourth amendment" even though the F.B.I. investigation activities established "a strong probability" that defendant was violating federal law.

The importance of the *Katz* holding we pointed out in *United States* v. *Hagarty,* No. 15881 (January 11, 1968):

> "* * * Thus the Government first urges that Nasser's government office was not a constitutionally protected area. A similar argument with respect to the public telephone booth was rejected in *Katz,* where Mr. Justice Stewart pointed out that 'the Fourth Amendment protects people, not places,' and that what a person 'seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.' The key is whether defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the overheard conversation took place in an IRS office. The Fourth Amendment applies 'Wherever a man may be * * *.' 36 U.S. Law Week at 4081, 4083."

In the case at bar, the well-laid plans of the government agents were obviously made because the government recognized that defendant sought to exclude the "uninvited ear". For instance, why would it have hired informer Jackson, placed upon his person a hidden radio transmitter, and concealed agent Jackson in a kitchen closet of the home of the informer and thereby arranged to have a conversation between the informer Jackson and defendant overheard by agent Jackson?

By the particular means of surveillance used, it seems to us patent that the government recognized that defendant's rights under the fourth amendment, as declared in the rulings of the United States Supreme Court, had to be respected. We now apply the principles announced by the Supreme Court in its recent pronouncement in *Katz* to the situation here presented. At 353, the court said:

> "* * * once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> "* * * The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. * * *"

At 357, the court added:

> "* * * Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * and that searches conducted outside the judicial process, without prior

approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

"* * * Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.

"* * * And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' * * *

"These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."

This language, which is clear and convincing, is decisive here. In accordance with the ruling in *Katz,* we hold that the judgment from which this appeal was taken must be reversed.

2. In view of our disposition of this issue we find it unnecessary to consider other alleged trial errors cited by appellant.

Accordingly the judgment of the district court is reversed.

JUDGMENT REVERSED.

Nos. 16021 and 16022

CASTLE, *Circuit Judge,* dissenting. Unlike the situations presented in *Katz* v. *United States,* 389 U.S. 347, and *Berger* v. *New York,* 388 U.S. 41, there was no "eavesdropping" involved in the instant case. Here, one party to the conversations consented to their electronic recording and transmission. Although, like in *Hoffa* v. *United States,* 385 U.S. 293 and *Lewis* v. *United States,* 385 U.S. 206, such activity constituted a betrayal of the defendant's confidence, he did intend the informer to hear what he was told. And, that the informer breached the confidence the defendant reposed in him by recording and transmitting the conversations—or in permitting a government agent to overhear them—does not violate any constitutional right of the defendant.

In our recent decision in *United States* v. *Hagarty,* (No. 15881, Opinion filed January 11, 1968) cited by the majority this Court pointed out that, "[n]either Hagarty nor Nasser had consented to the eavesdropping".

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix D.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September Term 1967

GEORGE HENRY DOTY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9031

CLEO EPPS,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9032

RAYMOND O. JONES,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee
No. 9033

JERRY LEE HOLIDAY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee
No. 9035

BILLY RAY ADAMS,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9036

HAROLD BEN MARLEY,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9037

ALBERT HILL, JR.,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee,
No. 9038

SAM GILBERT,
Appellant,
vs
UNITED STATES OF AMERICA,
Appellee.
No. 9034

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Thomas A. Wallace (Everett S. Collins and Thomas A. Wallace on the briefs) for Appellants Doty (9031), Epps (9032), Jones (9033), and Gilbert (9034).
John A. Claro, for Appellants Holiday (9035), Adams (9036), Marley (9037), and Hill (9038).
James E. Ritchie, Assistant U. S. Attorney (Lawrence A. McSoud, United States Attorney; James E. Ritchie, Assistant U. S. Attorney; Robert P. Santee, Assistant U. S. Attorney, on the brief) for Appellee.

Before MURRAH, Chief Judge, JONES* and HILL, Circuit Judges.

JONES, Circuit Judge.

This is an illicit still and nontax-paid whiskey case on appeal from the United States District Court for the

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* of the Fifth Circuit, sitting by designation.

Northern District of Oklahoma. In that court the appellants George Doty, Cleo Epps, Raymond O. Jones, Jerry Lee Holiday, Billy Ray Adams, Harold Ben Marley, Albert Hill and Sam Gilbert, were tried together on an indictment containing fourteen substantive counts charging violations of 26 U.S.C.A. Secs. 5179(A), 5173(A), 5205(A)(2), 5601(A)(1), 5601(A)(2), 5601(A)(4), 5601(A)(7) and 5604(A)(1). A fifteenth count based on 18 U.S.C.A. Sec. 371 charged the defendants with conspiring among themselves and with other unnamed persons to violate the above and other sections of the Internal Revenue Code.[1]

With the exception of Sam Gilbert, who was charged only with conspiracy, verdicts of guilty were returned against each of the appellants on the several substantive charges against them. All of the defendants, except Albert Hill, were convicted of the conspiracy charge. Specifying numerous errors as a basis for reversal, the defendants have appealed from the judgments entered on the jury's verdicts. Because of our disposition of the case, however, several of the questions raised need not be discussed or decided.[2]

The principal and most persuasive of the appellants' arguments urges the impropriety of Government counsel's closing remarks to the jury. The record discloses that, of the eight defendants, only Cleo Epps and Sam Gilbert testified in their own behalf.[3]

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[1] 26 U.S.C.A. Secs. 5171(A), 5601(A)(8), and 5601(A)(12).

[2] Appellants Holiday and Adams assert that incriminating statements were elicited from them in violation of the Fifth Amendment; appellants Hill and Epps assert that a fatal variance exists between the indictment and the evidence adduced at the trial, and several of the appellants assert the lack of substantial evidence to show the existence of a conspiracy.

[3] Appellants Holiday and Marley also took the stand. But their testimony was elicited only in support of collateral motions.

The other defendants remained silent. Appellants contend here that the United States Attorney focused the jury's attention on this fact.

Government counsel's final argument was divided into two fifteen minute portions permitting time for the defense attorneys' closing remarks to intervene. At the beginning of Governmnet counsel's jury address, at a time when the jury is likely to be most attentive, the following observation was made:

> "I think the most important thing that has been demonstrated by the evidence in this case is that the evidence is uncontradicted as against every defendant except the defendant Epps and the defendant Gilbert. There is no evidence to deny George Doty, Raymond O. Jones, Thomas Graham. There has been no evidence to contradict that whatsoever. Upon your oaths as jurors, you have no other obligation except to come in with a verdict of guilty as to those defendants because that evidence goes to you now and is to be considered and it has not been contradicted by the defendants whatsoever. It is undisputed. There has been no explanation of it. It is uncontradicted evidence, therefore it stands for the truth."

And again in the second fifteen minute portion of his argument to the jury, the United States Attorney asserted:

> ". . . And as I warned you when I made my opening statement in this case, they are going to hit these minor things, but have they gotten up here and discussed the evidence in this case. They have not. Again, still even in the arguments, they have done nothing to show, to contradict the evidence against all of these defendants except two people. And who are these people? The

person who is running the operation and her brother who is the purchasing agent."

It is the general rule that Government counsel may direct the jury's attention to the fact that the evidence against the defendant is uncontradicted, especially when the facts in issue could be controverted by persons other than the defendant.[4] Ruiz v. United States, 10th Cir. 1966, 365 F. 2d 103. If this rule were controlling here, then the Government's contention that its attorney's remarks constitute fair comment might have some validity.[5] Because it is our view, however, that the attorney's remarks go beyond a permissive comment that the evidence is uncontradicted is shown by the more general rule as thus stated:

> "It is concededly improper and reversible error to comment on the failure of a defendant to testify in his own behalf, and the test is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Knowles v. United States, 10th Cir. 1955, 224 F. 2d 168.

The prosecutor conceded that the Government's evidence was contradicted as to two defendants whom he named. These defendants had taken the stand. The prosecutor

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[4] The extent to which this rule conflicts, if at all, with Desmond v. United States, 1st Cir. 1965, 345 F. 2d 225, which held that a prosecutor could not properly say to the jury that the evidence was uncontradicted when only the defendant was able to controvert the damaging testimony, need not be discussed. We note only that this Circuit has not been confronted with a case where the fact of uncontradicted evidence has been pointed out to the jury when a defendant was the only person who could offer a contradiction.

[5] But see Desmond v. United States, *supra* note 4.

asserted and reasserted that the evidence was uncontradicted as to the others. The innuendo is plain. It is clear that the prosecutor intended that the jury should infer that the evidence was uncontradicted by those defendants who did not take the stand. When the prosecutor named the two who had testified and conceded that the evidence as to them was contradicted, can it be doubted that he commented upon the failure of the others to testify when he emphatically demanded the conviction of those who had not testified on the ground that: "The evidence is uncontradicted." The prosecutor's statement that the evidence "has not been contradicted by the defendants" was little, if any, different in meaning, in the context of his argument, from a statement that the defendants had not testified. We conclude that the prosecutor's comments were improper and prejudicial as to all of the appellants, except Gilbert and Epps, and that the convictions of these six appellants must be reversed on this ground.

The Government urges that, even if the prosecutor's comments were prejudicial, appellants have waived the error by failure to timely object. It is established that:

> "Counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-239, 60 S.Ct. 811, 84 L.Ed. 1129.

In this connection, however, consideration must be given to Rule 52(b), Fed. R. Crim. Proc., 18 U.S.C.A., which provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

We believe this rule to be controlling here.

It seems sufficient to say that the prosecutor's comments to the jury operated to diminish the scope of a clearly delineated constitutional guarantee.

> "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' Murphy v. Waterfront Comm'n., 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed. 2d 106, reh. den. 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed. 2d 730.

We would be remiss in holding, particularly where prejudice is so clearly apparent, that an error of constitutional dimensions does not affect substantial rights. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705; Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. The error is plain; and, notwithstanding the failure to object, the comments cannot be condoned.[6]

Appellant Gilbert, who testified in his own behalf at the trial, challenges the sufficiency of the evidence to support the jury's verdict finding him guilty of conspiracy to violate several Internal Revenue laws of the United States. A conviction under 18 U.S.C.A. Sec. 371 requires "Proof of an agreement to commit an offense against the United

[6] Other cases finding a prosecutor's closing argument to constitute plain error are United States v. Graham, 6th Cir. 1963, 325 F.2d 922; Wagner v. United States, 5th Cir. 1959, 263 F.2d 877; Ginsberg v. United States, 5th Cir. 1958, 257 F.2d 950; Stewart v. United States, D.C. Cir. 1957, 247 F.2d 42; Read v. United States, 8th Cir. 1930, 42 F.2d 636.

States." Pereira v. United States, 347 U.S. 1, 12, 74 S.Ct. 358, 98 L.Ed. 435. In Jones v. United States, 10th Cir. 1958, 251 F. 2d 288, 290, it is stated by this Court:

> " 'In determining [the question of] the sufficiency of the evidence to support a verdict, the inferences to be drawn therefrom are viewed in the light most favorable to the prosecution.' " O'Neal v. United States (10th Cir. 1957, 240 F. 2d 700, 701); Seefeldt v. United States, 10th Cir., 183 F. 2d 713; Wilder v. United States, 10th Cir., 100 F. 2d 177. The agreement need not be in any particular form. By its nature it is seldom susceptible of direct proof. Ordinarily conspiracies can be established only by the acts and conduct of the conspirators and the inferences to be drawn therefrom. Butler v. United States, 10th Cir., 197 F. 2d 561. Generally convictions will be sustained if the circumstances, acts and conduct of the parties are of such character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists."

Necessarily, knowledge of the conspiracy is "an essential ingredient of the proof" required to support a verdict. Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed. 2d 1503.

The evidence, as it relates to Sam Gilbert's involvement in a conspiracy, may be thus summarized. On March 30, 1965, Gilbert purchased 10,000 pounds of sugar from Gordon Hixson with funds obtained from his sister, appellant Epps. Hixson arranged the sale through a warehouse in Fort Smith, Arkansas. On April 8, 1965, an additional 12,000 pounds of sugar was purchased through the same grocer and warehouse, but Gilbert denies any involvement in this transaction. To prove Gilbert's involvement in the

second transaction, Alcohol and Tobacco Tax investigators testified that on April 8, 1965, they followed a red Ford truck travelling along Highway 64 away from Fort Smith, Arkansas, toward Warner, Oklahoma. Following two or three car-lengths behind the truck, the investigators, so they claimed, were able to ascertain that the truck contained many sacks of White Gold sugar. One of the investigators, Robert M. Finley, stated that, when the truck entered a weigh station near Warner, a 1964 maroon Chevrolet containing two occupants pulled off alongside the road just past the station. Finley testified that, after a few minutes, the maroon Chevrolet continued on into Warner, pulled into a drive-in parking area, remained there for a short while, proceeded back toward the weigh station, and then ten or fifteen minutes later returned to the drive-in parking area.

In addition to corroborating this account, John L. Day, the other investigator, testified that Sam Gilbert was the driver of the truck and identified Cleo Epps and Raymond O. Jones as the occupants of the maroon Chevrolet.

Our attention is directed to no other testimony showing appellant Gilbert's connection with or knowledge of the alleged conspiracy. Viewing the evidence in a light most favorable to the prosecution, it may be taken as established that Gilbert made large sugar purchases on March 30 and April 8, and that, on this latter occasion, he was convoyed into Oklahoma by his sister and Raymond O. Jones. The jury might conjecture that Gilbert was hauling sugar to a still but the fact that he was being followed for some undisclosed purpose by Epps and Jones does not trace the sugar to any still identified with any of the other alleged conspirators or into any illicit spirits which any of the other alleged conspirators may have made or sold. The most speculative conjecture could not place the sugar

hauled by Gilbert at the still of any of the other alleged conspirators at any pertinent time since the raid was a half year later. No testimony even intimates that Gilbert was personally involved in any of the whiskey sales. While Gilbert's sugar purchases and association with Epps and Jones may be sufficient to create a suspicion, we say here as this Court has said before:

> "Evidence which creates a mere suspicion of guilt is not enough. Guilt may not be inferred from mere association." Glover v. United States, 10th Cir. 1962, 306 F. 2d 594.

The evidence against Gilbert is not sufficient to support a conviction.

Appellant Cleo Epps, who also testified at the trial, was convicted on two counts of aiding and abetting others in the sale of untaxed spirits and of conspiracy to violate specified Internal Revenue laws relating to liquor. At trial the Government was permitted, over appellant's objection, to introduce into evidence several tape recordings of telephone conversations carried on between Epps and Charles Reese Walter, an undercover Alcohol and Tobacco Tax investigator. These recordings, which were made with the consent and under the direction of Agent Walter, constituted a substantial part of the Government's case against Epps. Epps contends here that the admission of these recordings into evidence invaded her rights under the Fourth Amendment.

Katz v. United States, 389 U.S. 347, 88 S.Ct. ——, 19 L.Ed. 2d 576, is the most recent of the Supreme Court decisions dealing with the admissibility of electronically obtained eavesdrop evidence. In that case, it was held that the use of an electronic listening and recording device attached to the outside of a public telephone booth to obtain

evidence against a suspect constituted a "search and seizure" within the meaning of the Fourth Amendment. Because the search was conducted without prior judicial sanction as required by the Fourth Amendment, Katz' conviction was reversed.

We think the principles of Katz are applicable here. There is, to be sure, a factual difference between this case and Katz. We are unable to see any distinguishing difference between the placing of the eavesdropping device at one rather than at the other end of the telephone line over which the recorded conversation was communicated. The fact that the appellant's recorded conversation was with an undercover agent of the Government does not render it admissible. United States v. White, 7th Cir. 1968, —— F. 2d ——, March 18, 1968, Nos. 16021, 16022. But see Dancy v. U.S. 5th Cir. 1968, —— F. 2d ——, Feb. 1, 1968, No. 24611. Because no prior approval by judge or magistrate was sought or obtained, the search was unreasonable, and appellant Epps is entitled to a new trial without this evidence being used against her.

It seems appropriate to observe that while the conviction of the appellant, Harold Ben Marley, is being reversed because of improper comment of the prosecuting attorney, a reversal would probably be required because of inadequate evidence to sustain a conviction. It is shown that Marley made several purchases of plastic jugs using the same alias as had been used by the appellant Jones in making similar purchases. More than four months after the last of his jug purchases, Marley was seen driving a pick-up truck along a country road about a mile distant from the location of the still which was involved in this cause and which was then under surveillance by the agents of the revenue. This evidence, like that against Gilbert, may create a strong suspicion that Marley was implicated

in a conspiracy with some or all of the other appellants, but it is not enough to make a case for the jury.

For the reasons herein set forth, the judgment of the district court as to all of the appellants is reversed and the cause remanded for such proceedings, not inconsistent with the opinion, as may be appropriate.

REVERSED AND REMANDED.